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Franchisors: Is your plain vanilla FDD working against you?

By Rochelle Spandorf

If your dream candidate were to ask what makes your franchise system special, you'd not hesitate to rattle off a list of attributes distinguishing your program from the crowded field of franchise opportunities. So why are you using a "plain vanilla" Franchise Disclosure Document (FDD) that fails to put your program's best features forward?

If you've been in franchising for any length of time, you know that the FDD is a government-mandated disclosure document that all franchise sellers must use to offer their franchise opportunity. The FDD's 23 disclosure categories collectively aim to supply basic information to prospects about a franchisor's history, management and franchise program in a uniform format enabling franchise buyers to use the FDD to compare franchise opportunities more or less apples to apples.

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instead opt for a "plain vanilla" FDD, a phrase I use to describe a FDD written in bland, nondescript language so that with a couple of find/replace keystrokes the basic stock can be recast for any type of franchise business (be it hamburgers, plumbing or senior care), or one cobbled together with text cut and pasted from other franchisors' documents, but, in each case, one that does not reflect the best features of the franchisor's own franchise program.

Having written and reviewed hundreds of FDDs (and predecessor UFOCs), I know a good specimen from a plain vanilla job and have a good idea why so many franchisors settle for second-rate disclosures. What franchisors don't appreciate is that they may be sabotaging franchise sales and setting themselves up for legal claims in the process.



Rochelle Spandorf

the FDD is a legal document, the vehicle that satisfies your pre-sale disclosure duty, but to deny that the FDD serves a

marketing function sells the document short. FDD Item 1 allows you to tell your story by explaining the distinctive attributes of your franchise offering. Too often, franchisors settle for plain vanilla disclosures believing they are better off by not saying too much. While the FDD must to be written in plain English free of legalese and marketing fluff, you need not scrub the FDD clean of information that highlights what makes your

franchise program special. Plain English is one thing, plain vanilla quite another. Compare your FDD to your company's franchising web page: Are the two mismatched? Does the franchising web page identify details about your franchise opportunity that your FDD could or should convey in the appropriate disclosure category? Reread your FDD as if you were a prospective buyer: Does it express your company's key attributes, the same qualities you'd recite to your dream candidate at a trade show? If you answer no, your FDD is not doing its job.

With a nod to David Letterman:

Here are the top 10 reasons why franchisors settle for less when it comes to preparing their FDD and the fallacy of their logic:

1 The FDD is just a legal document, not a marketing tool. No question,

2 No one reads the FDD anyway. A franchisee's failure to read the FDD before signing the franchise agreement does not excuse you from franchise sales laws. Unhappy franchisees whose franchise

forfeit the chance to use the legal document to distinguish them and

investment fails to live up to their expectations will find ways to sue you to recover their investment regardless of whether they bothered to read the document before they signed on. Franchise sales laws are consumer protection laws strictly construed by courts in favor of franchisees, even sophisticated ones, and impose personal liability on the franchisor's management team even if the franchisor is a business entity. Many a lawsuit has been built on technical defects belatedly identified only after an unhappy franchisee has hired a qualified franchise attorney to evaluate its case. Unhappy franchisees are not the only potential plaintiffs: Government agencies also have standing to seek remedies on behalf of injured franchisees. A lawsuit's very filing even if ultimately not successful is a costly, time-consuming nuisance whose pending status must be disclosed to your future prospects. Furthermore, it's untrue that no one reads the FDD: Plenty of candidates read the FDD or retain legal counsel to review it before signing a franchise agreement, especially as more qualified candidates displaced from corporate America join franchise ranks.

3 As long as my FDD is nondescript, franchisees won't sue me. Even if your FDD fails to describe your franchise program, franchise buyers will rely on other things you've said or done in deciding to buy a franchise from you, including statements on your website and conversations with your sales team. It's sloppy practice for your FDD to say something different or keep silent about these promises. Too often, franchise opportunity web pages or salespeople present different fees and initial investment costs than disclosed in the franchisor's FDD or tout program highlights not mentioned in the FDD or franchise agreement. The mismatch between the FDD and these other sources of information not only can destroy your legal defenses, but plaintiff's counsel can use your shoddy



work to portray you unsympathetically to a jury as disdainful of the law. While complying with franchise sales laws starts with using a legally compliant FDD, it does not end there.

4 My business consultant wrote it for me. Drafting franchise agreements, disclosure documents and licensing agreements is the practice of law. Every reputable franchise consultant worth his or her weight directs their franchisor clients to an experienced outside franchise attorney to prepare the franchise documentation. There are good reasons to steer clear of franchise packagers who provide FDD toolkits or tout their "all-under-one-roof" approach where the consultant's in-house attorney will prepare your FDD.

Your conversations with your own attorney are privileged, i.e., your attorney cannot be called upon to testify against you as to what you confided in him or her. But your conversations with a consultant or the consultant's in-house attorney are not privileged: The in-house attorney represents the packager, not you, and can be compelled to testify about nonpublic information that you divulged even if you were assured the communications would remain confidential. Foremost, you deprive yourself of the benefits of independent legal expertise on issues essential to structuring the franchise relationship properly, like lease control, trademark protection, capital formation, pricing programs, exclusive supplier arrangements, vicarious liability and similar concerns. A well-qualified franchise attorney respected by state franchise examiners can simplify the registration process and more credibly manage your sales team if a state registration goes dark as inevitably happens if your audited financial statements are late. Consultants who insist that they can or should prepare your FDD in-house are either ignorant or dismissive of the proper boundary between legal work and business consulting.

5 My attorney wrote it for me. Franchising is a specialized field of law. Indeed, California recognizes franchise and distribution law as a distinct legal specialty. While this does not mean that only California certified specialists are qualified to write legally compliant FDDs, California has raised the bar on the level of professional competency that attorneys everywhere must have in order to represent their franchise clients adequately. Your general practitioner may capably represent you in other legal matters, but he or she is risking malpractice by preparing your franchise documents and advising you about franchise sales duties without the requisite experience. Because FDDs are public documents, it is easy for anyone (including non-lawyers) to cobble one together by cutting and pasting text from other franchisors' specimens and pass it off to an unsuspecting client. In some cases, the copying is intentional based on the faulty logic that by lifting text from a seasoned franchisor's FDD, the copycat guarantees itself a legally compliant FDD. In fact, the copied product may be woefully deficient for, or barely relevant to, the copycat's program. It has happened more than once that clients have brought me a FDD to review or revise that I immediately recognize as something I wrote for another franchise system. Also, be very wary of attorneys who claim they can deliver a perfect specimen based strictly on your answers to their questionnaire without spending any time with you to confirm both that you understood the questions perfectly and left nothing material out, and know about equally important sales compliance duties besides the FDD document, like FDD delivery rules and state registration requirements.

6 I bought a do-it-yourself package and filled in the blanks. As the saying goes, "One who acts as his own attorney has a fool for a client."

7 All my competitors use plain vanilla FDDs. Just as the famous "all my friends are doing it" excuse never cut it with your mother, justifying the use of a plain vanilla FDD because your competitors use one is neither good reason nor sound practice. A plain vanilla FDD

not only risks legal liability, but it won't differentiate your opportunity and, in fact, may leave prospects thinking you're someone else!

8 If I am ignorant about the law, my plain vanilla FDD can't hurt me.

As a franchise seller, you are potentially liable for franchise sales law violations even if you did not intend to violate the law or lacked actual knowledge of technical disclosure requirements. An unhappy franchisee or government agency need only prove that your FDD was defective by omitting or misstating material information. By imposing strict liability, the law sets a high bar for franchise sellers and holds your management personally responsible.

9 I can't afford a custom FDD. If

cost-cutting is your excuse for using a plain vanilla FDD, you've probably grossly underestimated your capital needs to grow the franchise network successfully over the long-term. The investment in a custom FDD is a fraction of what it takes to fund operations, R&D and network expansion, and it's naïve to assume you'll be able to pay for everything out of initial fees and royalty income cash flow from

the get-go. A leading reason franchise systems fail is due to inadequate capital. Franchisors slash their chances for success by not investing in expert advice to design an appropriate franchise model based on their own core strengths; prepare economic models and forecasts to set fees appropriately and gauge their own and their franchisees' potential revenue from the franchise relationship; and draft articulate, enforceable franchise documents that fulfill legal requirements and advance marketing goals. Investing in a custom FDD is a front-end, infrastructure expense. Once you've set out with a FDD that tells your story, the annual cost to keep the custom FDD current is no more than what you'd incur for the plain vanilla job. Meanwhile, your expert team is in place available to address any growing pain issues as they arise.

10 I am better off telling my prospects the "real" story face-

to-face. If your FDD does not match the "real story" about the material terms and conditions of your franchise offer, you can bet your FDD will end up as Exhibit A in a lawsuit brought by an unhappy franchisee or an investigation by a government agency who has gotten wind

you're selling franchises based on representations materially at odds with your FDD. It's perfectly fine to extol the franchise program's benefits to prospects face to face, but what you say must be entirely consistent with information in your FDD, franchise agreement and operations manuals, and delivered as operational support and at training programs. Any material mismatch may support statutory and common law liability.

Franchising is an enticing growth vehicle, but unfortunately, too many companies leap into franchising undercapitalized and without expert guidance. They fail to appreciate that by franchising they are embarking upon an entirely different business that commands a host of different skills for which they may have little experience. The allure of franchising misguides them into cobbling together their own franchise documents from other franchise systems thinking that by copying the successful brands they're guaranteed their own documents will be legally compliant and their franchise system equally successful.

Operating a franchise system on a shoestring rarely, if ever, works. [FT](#)

About Rochelle Spandorf

Shelley Spandorf is a nationally recognized business franchise and distribution attorney with more than 30 years of experience representing franchisors, manufacturers, licensors, suppliers, franchisees and distributors in their domestic and international expansion and strategic development. She concentrates her practice on a broad spectrum of transactional and regulatory issues for clients in all industry sectors, from startups to mature public companies.

Shelley helps start-up franchisors structure their franchise program and contractual arrangements and assists clients with franchise sales legal compliance by preparing franchise disclosure documents, domestic and international franchise and distribution agreements, and registration

filings. She counsels franchise and non-franchise distribution systems on a broad array of operating issues and transactions ranging from brand extension programs, contract enforcement and trademark protection to relationship disputes, antitrust and pricing matters, terminations and transfers, mergers and acquisitions, and the implementation of system-wide changes.

Shelley has advised numerous companies on the issue of whether a particular commercial arrangement is a franchise. With significant expertise on this issue, she has not only served as an expert witness in litigation, but helped dozens of companies evaluate restructuring alternatives to avoid regulation as a franchise. Shelley supplies strategic litigation support in cases where franchise status is an issue and represents clients in mediations

and before government agencies in addition to serving as a mediator of franchise disputes.

Shelley assists companies in the acquisition of franchise systems and corporate financing by providing franchise due diligence reviews and lead counsel services. On behalf of franchisees and area developers, Shelley assists with the acquisition and sale of franchise rights and various transactional assignments.

Shelley is ranked by Chambers USA as one of the leading franchise attorneys in the country, and recognized as a certified specialist in franchise and distribution law by the California State Bar.

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About Davis Wright Tremaine's Franchising Practice

Our success helping clients with their domestic and international franchise growth has earned Davis Wright Tremaine a global reputation for excellence and creative problem-solving. Setting Davis Wright Tremaine apart from other legal providers is our ability to offer franchise and distribution clients complete legal support. Unlike packagers of off-the-shelf franchise disclosure documents and general practitioners inexperienced with the nuances of franchise law, our franchising attorneys are leaders in the field with decades of experience helping hundreds of different franchise and licensing concepts design and launch their networks. Our attorneys know how to craft custom solutions that distinguish the client's franchise and distribution program in the marketplace. We dedicate the time to understand each client's business objectives and structure franchise, distribution and licensing programs that advance

each company's unique business goals. Our franchise clients benefit from immediate access to the firm's vast resources. In addition to offices in 8 U.S. cities, our Shanghai office provides clients with a strong base for expanding into Asian markets and Asian companies a local conduit for expanding into the U.S. Not only do we serve as legal counsel on many significant domestic and international franchising and distribution transactions, but our deep industry knowledge and connections in the hospitality, restaurant and food service sectors, the most active industries that utilize franchising, enables us to deliver value-added benefits to clients in these sectors unmatched by other law firms. We are proud to serve as a primary resource for our franchise and distribution clients.

For more information about DWT's Franchising Practice, please visit www.dwt.com.



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